IN THE COURT OF APPEALS OF THE STATE OF TENNESSEE
MIDDLE DIVISION

ON APPEAL FROM THE CHANCERY COURT OF SUMNER COUNTY

KENNETH L. JAKES,	)	
	)	**NO. M2015-02471-COA-R3-CV**
Plaintiff/Appellee,	)	
	)	**SUMNER CO. CHANCERY COURT**
vs.	)	
	)	**NO. 2014CV53**
SUMNER COUNTY BOARD OF EDUCATION,	)	
	)	**JUDGE DEE DAVID GAY**
	)	
Defendant/Appellant.	)	

BRIEF OF PLAINTIFF/APPELLEE KENNETH L. JAKES

COMES NOW Plaintiff/Appellee Kenneth L. Jakes by and through counsel of record and pursuant to Rule 27 of the Tennessee Rules of Appellate Procedure and submit the brief herein.

The Trial Court Record will be referred to as follows: Technical Record: TR Vol. "#", p. "#"; Transcript of Proceedings: TP Vol. "#", p. "#"; Trial Exhibits: TE "#".

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
STATEMENT OF ISSUES	5
STANDARD OF REVIEW	6
STATEMENT OF FACTS	7
LAW AND ARGUMENT	14
CONCLUSION	64

TABLES OF AUTHORITIES

CASES

Allen v. Day 213 S.W. 3d 244 (Tenn. Ct. App. 2006)	19, 20, 23
Bryant v. Genco Stamping 33 S.W. 3d 761,764 (Tenn.2000)	17
Friedmann vs. Marshall County 471 S.W.3d 427 (Tenn. Ct. App. 2015)	38, 39, 40
Gleaves v. Checker Cab Transit Corp. 15 S.W.3d 799, 803 (Tenn. 2000)	18
Greer v. City of Memphis 356 S.W. 3d 917 (Tenn. Ct. App. 2010)	36
Harman v. Univ. of Tenn. 353 S.W. 3d 734 (Tenn. 2001)	24
Hickman v. Tennessee Board of Probation & Parole 2003 WL. 724474 (Tenn. Ct. App. March 4, 2003)	27
Neff v. Cherokee Ins. Co. 704 S.W.2d 1 (Tenn. 1986)	15
Schneider v. City of Jackson 226 S.W. 3d 332 (Tenn. 2007)	41
State vs. Harkins, 811 S.W. 2d 79,82 (Tenn. 1991)	17
State vs. Powers 101 S.W. 3d 383 (Tenn. 2002)	21
Waller vs. Bryan 16 S.W. 3d 770, 773 (Tenn. Ct. App. 1999)	15, 28, 45

STATUTES

T.C.A.§ 10-7-503	15,16, 20, 25, 27, 36, 44, 47, 59
T.C.A. §10-7-505	15, 36
T.C.A. § 10-7-506	17

PLAINTIFF/APPELLEE KENNETH JAKES' STATEMENT OF ISSUES

I. Whether or not the Trial Court abused its discretion in failing to award Plaintiff attorney's fees;

II. In the alternative, if the Court finds the Trial Court did not abuse its discretion in failing to award Plaintiff attorney's fees, whether or not the Trial Court abused its discretion in granting Defendant's Motion for Protective Order, which prevented Plaintiff from conducting oral discovery;

III. Whether or not the Trial Court erred in failing to issue a permanent injunction enjoining Defendant from denying records request which are transmitted by conventional methods of communication such as email, facsimile or telephone;

IV. Whether or not the Trial Court's finding of fact that Plaintiff's March 31, 2014 records request was not sufficiently detailed was supported by a preponderance of the evidence.

STANDARD OF REVIEW

Appellate review of findings of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. *See* Rule 13 of the Tennessee Rules of Appellate Procedure. If the trial court does not make a finding of fact, there is no presumption of correctness, and the appellate court "must conduct [its] own independent review of the record to determine where the preponderance of the evidence lies." *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. *Ivey v. Trans Global Gas & Oil*, 3 S.W. 3d 441, 446 (Tenn. 1999).

STATEMENT OF FACTS

On February 5, 1991, the Defendant Board adopted a policy titled "School Board Records". The policy states in pertinent part, "The Director of Schools shall maintain all school system records required by law, regulation and Board Policy. Any citizen of Tennessee . . . shall be permitted, upon written request, at a reasonable time, to inspect all records maintained by the school system unless otherwise prohibited by law, regulation, or board policy. A person who has the right to inspect a record may request and receive copies of the document subject to the payment of reasonable costs." (TE No. 1).

On or about March 6, 2014, Neil Siders, a local journalist, was preparing to teach a class to citizens at a meeting held by Sumner United for Responsible Government about how to make public records request. He had presented at the office of a few governmental entities in Sumner County, to include Hendersonville City Hall, the Sumner County Administrative building, Gallatin City Hall, to obtain forms to make public records requests. His last stop was at the Central Office of the Sumner County Board of Education and upon arrival he requested a public records request form from the secretary at the front desk. The secretary was unable to respond to Mr. Siders' request and Mr. Siders was directed to the Director's office. (TP Vol. XI, p. 287-288). Upon arriving at the Director's office, Mr. Siders once again requested a form regarding public records requests. Again, Mr. Siders was not assisted but instead was directed to the Finance Office. Mr. Siders proceeded to the Finance Office and once again requested the public records request form. (TP Vol. XI, p. 287-288). However, once again, Mr. Siders was not assisted but was directed to Mr. Jeremy Johnson, the Director of Communications for the Sumner County Board of Education. Upon speaking with Mr. Johnson, Mr. Siders advised him about his intent to demonstrate to citizens how to make public records request. Mr. Johnson

advised that there were no forms which were available at the school board, however, Mr. Siders could merely submit his records request via email. (TP Vol. XI, p. 289-290). Mr. Johnson did advise Mr. Siders that a generic form was available on the Comptroller's website. (TP Vol. XI, p. 295-296).

On March 10, 2014, Kurt Riley a citizen of Sumner County presented at the Director's office and completed a records request form, in which Mr. Riley requested the following: "Please provide for my review and inspection any and all credit card statements for all employees elected officials and their personnel from July 2013 to the current." This request form was received by Jeremy Johnson on March 10, 2014. (TE No. 13). On or about March 12, 2014, Mr. Riley received a certified letter from Jeremy Johnson in which Jeremy Johnson advised that the records requests made by Mr. Riley would be available on or after March 14, 2014. Further, Mr. Riley was advised to contact Jeremy Johnson and schedule a time for the inspection. Sometime after March 20, 2014, in response to Mr. Riley's records requests, the Defendant posted on its web site a written response to Mr. Riley's request. The opened statement of the page titled "Financial Transparency" is as follows: "On March 10, 2014, Kurt Riley representing Sumner United for Responsible Government (SURG) filed an Open Records Request with our office to 'review and inspect any and all credit card statements for all employees, elected officials and other personnel from July 2013 to current." Thereafter, a link was provided to review the actual records requested by Mr. Riley. The statement further stated, "Mr. Riley visited the Central Office on March 20, 2014 to review and inspect the requested documents. He chose to review the statements from July 2013 and August 2013 during that visit. Mr. Riley flagged and requested additional documentation for seventeen employee P Card statements from those specified months". Once again, the Board provided a link to review the actual request made by

Mr. Riley. The statement proceeds to state "of those seventeen statement and document receipts, ten statements were for purchases made by daycare employees for our school daycare program. Items purchased included snacks, activity supplies, and other expenses. School day-care are self funded paid by fees paid by parents for daycare services. Per Tennessee Department of Education requirements, monies raised through daycare fees can only be used on expenses for the children served in that schools day care." However, the Board concluded the statement by stating "We encourage everyone to review these pages and their links to supporting documentation for each purchased item to further understand how they are used within our school system. We felt like it was important for all citizens to have this information." (TE No. 14).

Sometime before March 21, 2014, Mr. Ken Jakes, the Plaintiff, was informed that the Defendant was denying citizens' requests for records and, thus, Plaintiff sought the records request policy. Mr. Jakes contacted Mr. Johnson via email on or about March 21, 2014, stating "Mr. Johnson, this is a Public Records Request to inspect and review. Please provide the following for my inspection. The Records Request Policy for the Board of Education. If the Records Policy is online you can simply provide the link, if not contact me when ready for review." (TE No. 5). Mr. Jakes followed up by leaving a voicemail on Mr. Johnson's telephone. In response to such a request, on March 24, 2014, Jeremy Johnson provided the following response via electronic mail. "In keeping with our practice regarding Open Records Request you will need to either submit your request in person or via the postal service." (TE No. 7). Mr. Johnson's statement is not only inconsistent with what he told Neil Siders just days before, it is inconsistent with the 1991 policy.

Further, it was not consistent even with the policy as amended by Director Del Phillips and Jeremy Johnson purportedly on or about March 20th, 2014. During the first week of March, notably after Mr. Siders had advised Mr. Johnson of his intent and after Mr. Riley had made his request, Mr. Johnson and Mr. Phillips met to discuss clarifications to the policy. (TP Vol. X, pp. 58-59). The title of this policy is "School Board Records-AP". The policy states in pertinent part, "A staff member shall be present during all records inspection to maintain the integrity of documents. Appointments will be scheduled for the inspection times to be sure that staffing is available . . .. Requests for inspection or copies of public documents shall be made to the Director's office under the supervision of the Supervisor of Boarding Community Relations. A request for inspection or copies of public documents shall be made in writing on the 'inspection/duplication of records request' form provided by the Office of Open Records Counsel of the Comptroller's Office of the State of Tennessee." (TE No. 1). Nothing in the policy states that the request cannot be made by electronic mail or that such requests have to be made in person. The Board's attorney, Jim Fuqua, was not consulted about the changes to this policy. (TP Vol XI, p. 242).

Mr. Johnson had dealt with the TPRA for years and he knew that a records request could not be required to be in writing. He also knew he could not require a citizen to make a request in person. (TP Vol. X, p. 94). Despite this knowledge the new policy Mr. Johnson assisted in drafting did require request to be in writing or in person. Mr. Johnson frequently referred to the website of the Office of the Open Records Counsel and the Best Practices which is disseminated by the OORC. (TP Vol. X, p. 101). Mr. Johnson acknowledges that the Best Practices requires that that record request should be responded to as promptly as possible (TP Vol. X, p. 103) and responses should be in the most economical and efficient manner possible (TP Vol. X, p. 104).

Mr. Johnson frequently communicates by email and believes that email is an efficient and economical way to communicate. (TP Vol. X, p. 105-106).

On March 25th, 2014, legal counsel for Plaintiff forwarded an email to the Jim Fuqua, the Board's attorney, requesting that the Board accept an email as a records request and relying on this Court's ruling in Waller v. Bryan. (TE No. 16). Upon receiving this email, which was on March 25th, 2014, Mr. Fuqua merely forwarded such to another attorney as he knew he was not going to be involved in the case and the Board had already decided it would hire an outside lawyer. (TP Vo. XI, p. 241). Despite the fact the case *Waller v. Bryan* was cited, Mr. Fuqua never reviewed this case to determine the Board's responsibilities and he never discussed the case with Elisha Hodge, who was the attorney for the Office of Open Records Counsel. (TP Vol. XI, p. 241). In fact, Mr. Fuqua did not do any research regarding the question raised by Plaintiff's counsel; he only read the statute and consulted with Elisha Hodge. (TP Vol. XI, p. 236). Mr. Fuqua has been practicing law since 1968, was on the Sumner County School Board from 1996 to 2000 and has been the Board's attorney since 2005. (TP Vol. XI, p. 218). Mr. Fuqua is very familiar with the TPRA and has dealt with the TPRA and the applicable federal law for many years. (TP Vol. XI, p. 237). Mr. Fuqua felt he was qualified to give an opinion regarding the requirements of the TPRA. (TP Vol. XI, p. 237). Mr. Fuqua is not aware of the length of time Ms. Hodge has been practice law. (TP Vol. XI, p. 236). Mr. Fuqua previously was an active member of the Tennessee School Boards Association when he was on the school board and is currently a member of the Council of School Board Attorneys, which is an organization sponsored by the Tennessee School Boards Association. In 2014, the TSBA made efforts through the Tennessee Legislature to change the law and allow school boards to charge citizens to inspect records. (TP Vol. XI, p. 239).

Mr. Fuqua contacted Elisha Hodge on or about March 26, 2014 and had a forty-five minute discussion with Ms. Hodge regarding whether or not the Board had to accept a records request via email and another matter. Mr. Fuqua did not have a discussion with Ms. Hodge about any specific case. (TP Vol. XI, p. 241). According to Mr. Fuqua, Ms. Hodge advised the Board did not have to accept an email as a records request, but such should be stated in the Board's policy. (TP Vol. XI, p. 232). Ms. Hodge did not provide Mr. Fuqua a written opinion. (TP Vol. XI, p. 235). Mr. Fuqua never asked Ms. Hodge about whether or not the Board had to accept a records request via telephone or voicemail and never discussed such with Mr. Johnson. (TP Vol. XI, p. 235 & 239).

On March 31, 2014, Mr. Jakes made a second records requests, as follows: "Mr. Johnson, as a public record request to inspect and to review please provide me the following: any and all communication between you and any other party or parties regarding my first public records request for the Board of Education to provide for my inspection the Board of Education Records Policy." Mr. Jakes did not receive a response to his March 31, 2014 request until February 23, 2015 when he received a letter from Mr. Johnson via certified US Mail in which Mr. Johnson advises that such information requested is protected by the attorney/client privilege. Interestingly, on February 19, 2015 the Board Policy Manual was revised with respect to the "Public Records Request Policy", which now states "Unless otherwise required by Law, Sumner County Schools does not require a written request to personally inspect a public record and does not access a charge to view a public record in person unless otherwise required by Law. Citizens electing to make an inspection of public records without a written request should appear in person at the office of the Board of Community Relations Supervisor, Sumner County Schools, 695 E Main Street, Gallatin, Tennessee, 37066, in order to make the request. If a citizen elects to

make a written request to inspect records, so that the Sumner County Schools will prepare the records in advance of the citizen actually appearing in person to inspect the records, then the citizen must make the advance written request on the form developed by the Tennessee State Controller's Office of the Open Records Counsel to either hand deliver or send the completed form via the US Mail . . .Sumner County Schools will not accept advance requests form for personal inspection of records via email, text message, facsimile, telephone, or other method of communication." (TE No. 4).

LAW AND ARGUMENT

I. THE TRIAL COURT FINDING THAT THE BOARD'S PUBLIC RECORDS REQUEST POLICY VIOLATES THE TENNESSEE PUBLIC RECORDS ACT (TPRA) SHOULD REMAIN UNDISTURBED AS THE TPRA NOR ANY PRECEDENT AFFORDS A GOVERNMENTAL ENTITY THE RIGHT TO IGNORE A RECORDS REQUEST WHICH SUFFICIENTLY IDENTIFIES THE RECORDS SOUGHT.

The Plaintiff would respectfully submit that he Trial Court's ruling that Plaintiff's March 21, 2014 records request made via electronic mail and voice mail were valid records requests pursuant to the TPRA and, thus, the Defendant's refusal to respond to such requests was in violation of the TPRA should remain undisturbed. The Plaintiff further would assert that the Trial Court's ruling that the Board's Public Records Request Policy which was in place at the time of Plaintiff's March 21, 2014 records request and the policy which was enacted in February of 2015 was in violation of the TPRA was proper and should also remain undisturbed. Despite the plain language of the Trial Court's findings, the Defendant has attempted to frame the issues in this case based on a holding that the Defendant must accept an email as a public records request; the Trial Court did not make such a finding. While Plaintiff agrees that a governmental entity is required under the TPRA to respond to any records request it receives including those which are submit by email, facsimile or other accepted forms of communication (*see* Sect. III, *infra.*), the Trial Court did not make a finding that the Defendant must accept an email as a records request. The Trial Court held that a policy which only gives a citizen the right to make a request by two methods: either requiring a citizens to submit requests in person or via U.S. Mail was in violation of the TPRA as the TPRA states explicitly that request for inspection cannot be required to be in writing and this Court held in *Waller v. Bryan*, that a citizen cannot be compelled to appear in person to make a records request. The Plaintiff would respectfully

submit that the Trial Court's holding in this regard should not be overruled as the plain language of the TPRA nor the precedent set by this Court affords the Defendant the right to ignore a records request.

A. THE PLAIN LANGUAGE OF THE TPRA DOES NOT AFFORD THE DEFENDANT THE RIGHT TO IGNORE A RECORDS REQUEST

This Court has held "It is this Court's duty to apply rather than construe the language of the Public Records Act, since the intent of the Legislature is represented by clear and unambiguous language." *Waller v. Bryan*, 16 S.W.3d 770, 773 (Tenn. Ct. App. 1999). Thus, if the Court simply applies the plain language of the TPRA it is clear that Plaintiff did make a request to inspect to which the Defendant had a duty to respond. T.C.A. § 10-7-505 states, "Any citizen in Tennessee who shall request the right of personal inspection of any State, County, or municipal records as provided in § 10-7-503 and his request has been in whole or part denied by the official and/or designee of any official . . . shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access." Further, the TPRA states in pertinent part, "All state, county and municipal records shall, at all times during business hours . . .be open for personal inspection by any citizen of this state, and those in charge of the records *shall not refuse such right of inspection to any citizen*, unless otherwise provided by state law." T.C.A. § 10-7-503(a)(2)(A). Thus, the TPRA makes it clear that any citizen who makes a request to inspect "shall not be refused the right of inspection" and if such is denied in whole or in part, the citizen has a right to petition for access to such records. The Defendant essentially asserts that because the TPRA does not require it to accept a records request by email (the Defendant fails to acknowledge the Plaintiff also made the request by

voicemail) the Defendant had the right to simply ignore Plaintiff's requests, however, such is not support by the TPRA. The plain language of the statute requires that if a citizen makes a request, which Plaintiff did, the request "shall not be refused" and if the request is denied, the citizen can petition for access; no language exists affording a governmental entity the right to ignore a request which was received.

The TPRA only has two primary limitations to making a request for inspection. First, the request to inspect "shall be sufficiently detailed to enable the records custodian to identify the specific records to be located or copied." *See* T.C.A. 10-7-503(a)(7)(B). Secondly, the individual performing the inspection may be required to provide identification. *See* T.C.A. 10-7-503(a)(7)(A). Otherwise, other than the right to promulgate reasonable rules regarding copying ,which will be addressed below, the TPRA does not provide any language limiting how such request to inspect is to be made nor does it afford a governmental entity the right to limit how the request is made. In fact, the TPRA provides that the government entity cannot require a citizen to make the request in writing and requires that the government entity to provide the records promptly upon request. The TPRA states in pertinent part, "The custodian of a public record or the custodian's designee shall promptly make available for inspection any public record . . . .A records custodian may not require a written request or assess a charge to view a public record unless otherwise required by law. *See* T.C.A. 10-7-503(a)(1)(B) & (7)(A). Thus, absent from the TPRA is any limitation on how the citizen may make a request and such omission, under the fundamental principles of statutory construction, reveals the intent of the legislature not to afford a governmental entity the right to simply ignore a request for a public record which it receives.

The only provision of the TPRA which provides the governmental entity the authority to dictate how a citizens exercise their rights under the TPRA relate to requests for inspections is

found at T.C.A. § 10-7-506(a), which states in pertinent part, "In all cases where any person has the right to inspect any such public records, such person shall have the right to take extracts or make copies thereof, and to make photographs or photostats of the same . . .; provided, that the lawful custodian of such records shall have the right to adopt and enforce reasonable rules governing the making of such extracts, copies, photographs or photostats." Using the well established rules of statutory construction it should be evident to the Court the legislature did not intend to afford a governmental entity the right to dictate how a request can be made. "The Court's role in construing statutory language is to ascertain and give effect to the legislative intent without unduly restricting or expending a statute's coverage beyond its intended scope. When the language within the four corners of the statute is unambiguous, the legislative intent must be derived from the statute's face. Therefore, we must follow the natural and ordinary meaning of a statute unless ambiguity requires us to seek clarification." *Bryant v. Genco Stamping*, 33 S.W.3d 761, 764 (Tenn. 2000) (citations omitted). Thus, the Court cannot expand a governmental entities rights as the Defendant proposes as the plain language of the statute sets out clearly the restrictions placed on citizens when making records request.

More importantly, however, had the legislature intended to afford the governmental entity the right to make "reasonable rules governing" making request as it did with regard to allowing citizens to make copies, the legislature would have stated such. It is a well establish principle of construction that "where a legislature includes particular language in one section of the statute but omits it in another section of the same act, it is presumed that the legislature acted purposefully in including or excluding that particular subject." *Id.* The Tennessee Supreme Court also held in *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991), "Normally, it is a rule of statutory construction which is well recognized by our courts, that mention of one subject in a statute

means the exclusion of other subjects that are not mentioned." In *Harkins*, at issue was the proper standard for review on appeal of a criminal court's decision on revocation of a community correction sentence. At the time of the decision, T.C.A. 40-35-402 provided that "the granting or denial of probation, in addition to the lengthy, range or manner of service of a sentence, is subject to a de novo standard of review." *Id.* at 82. However in finding that such did not apply to revocation of community correction sentence and that the abuse of discretion standard applied, the Tennessee Supreme Court held:

> While the statute specifically includes within its scope granting and denying probation, it includes no reference to probation revocation, and omits completely any reference to community corrections sentences, whether such be granted, denied, or revoked. Normally, it is a rule of statutory construction which is well recognized by our courts, that the mention of one subject in a statute means the exclusion of other subjects that are not mentioned . . .. It would appear that if the General Assembly intended to make the revocation of a community corrections sentence (or probation) subject o a de novo standard of review, it could have simply included such in the list of subjects contained in the statute. Its omission is significant, and it would be inappropriate for this Court to imply an entirely new topic into a statute that does not seek to address it in the first instance.

Id. (citations omitted). Likewise, in the case *sub judice*, if the General Assembly desired to afford the governmental entity the right to initiate reasonable rules regarding the method a citizen must use to request for inspection of public records, it seems the General Assembly would have included such in the language of 10-7-506, which specifically addresses reasonable rules which can be implemented when citizens make a request to inspect. However, the General Assembly clearly chose not to and, thus, "it would be inappropriate for this Court to imply an entirely new topic into the statute that does not seek to address it in the first instance." Therefore, a reading of the TPRA reveals that not only does the plain language of the TPRA require governmental entities to have all public records available for inspection during normal business hours, but such

reveals the legislature had no intent to afford the governmental entity the right deny a records request merely because of the method such request was made.

B. IN THE MATTER OF *ALLEN V. DAY*, THIS COURT HELD THAT THE OBLIGATIONS UNDER THE TPRA ARE TRIGGERED WHEN A GOVERNMENT ENTITY RECEIVES A REQUEST WHICH SUFFICIENTLY IDENTIFIES THE RECORDS SOUGHT.

Given the plain language of the TPRA, there simply is no legal support for the Defendant's assertion it had the right to ignore the Plaintiff's request just because it was made pursuant to an email. In fact this Court has flatly rejected the Board's position. A review of the opinion of the Court of Appeals in *Allen vs. Day*, 213 S.W. 3d 244 (Tenn. Ct. App. 2006) confirms such an interpretation of the TPRA.

In the matter of *Allen vs. Day* at issue was whether or not a government entity had to turn over a confidential settlement agreement pursuant to the Tennessee Public Records Act. [1] The Tennessee Court of Appeals held that the settlement agreement had to be disclosed. While there were several issues in this case, the threshold issue was whether or not the Court had subject matter jurisdiction pursuant to the Tennessee Public Records Act . The defendant in *Allen* made the same argument Defendant is asserting in the case *sub judice*: the Court did not have subject matter jurisdiction, meaning the obligation under the TPRA were not applicable, because the Plaintiff did not make a records request pursuant to the Tennessee Public Records Act as she failed to make a formal request pursuant to the statute. In response to such argument the Court of Appeals held as follows,

[1] Despite the Court finding that the settlement agreement had to be disclosed, the Court held that the trial court did not have authority to require it to be filed with the Circuit Court Clerk's office.

> [Defendant] Powers initially contends that neither Gannett or Ms. Burke fulfilled the statutory prerequisites stated above so as to provide the trial court with subject matter jurisdiction to adjudicate their petition. Gannett has conceded that it is not a citizen of Tennessee within the meaning of the statute, however, Gannett asserts that it's employee, Ms. Burke, met the statutory preconditions and thus the trial court properly exercised subject matter jurisdiction over the Petition. Ms. Burke admittedly did not personally appear during Power's normal business hours and request a copy of the settlement agreement from the Power's official records custodian. Gannett asserts however that this failure was not fatal to the acquisition of the subject matter jurisdiction. Ms. Burks affidavit filed on March 2, 2005, revealed that she inquired about the contents of the settlement agreement but that Power's spoke person denied access to the record, saying that the agreement was confidential . . .[A]s the Court alluded to *Waller*, the purpose of the personal appearance requirement is to prevent wasted governmental time and money caused by the endless search through the voluminous records, for a document which was insufficiently identified by the Petitioner. **Powers does not argue that Ms. Burks request was insufficiently described nor does it argue that it lacked notice of Ms. Burks' request due to her failure to personally appear before Power's official records custodian. Power's simply contends that Ms. Burke did not comply with the literal language of the statute and therefore she should be precluded from contesting the denial of access to the settlement agreement. To strictly construe the subject matter jurisdiction requirements, as Powers suggests, would be to defeat the clear language of the act which states that the access is to be broadly construed so as to give the fullest possible access to public records.** Tennessee Code Annotated 10-7-505 (d). Clearly in this case the denial of access by Power's spokesperson constitutes the denial by an official or designee of an official within the meaning of the Tennessee Code §10-7-505(a). Furthermore, it is undisputed that Ms. Burke sufficiently identified the requested document. We therefore find that Ms. Burke's request was sufficient to meet the statutory subject matter jurisdiction requirement and that the trial court properly exercised jurisdiction.

Allen vs. Day, 213 S.W.3d 244, 249 (Tenn. Ct. App. 2006)(emphasis added). The plain language of this Court's ruling sets the precedent that if the records request is received and acknowledged and such sufficiently identifies the records sought, if the TPRA is to be broadly construed to give the "fullest possible access to public records" a governmental entity has a duty to respond. Defendant cannot provide any binding authority to overcome this precedent as such precedent has not been overruled by statute or by a subsequent appellate ruling.

In fact, such precedent has been solidified by subsequent legislative action. The Tennessee Legislature made major revisions to the TPRA in 2008 and did not make any changes which sought to abrogate *Allen v. Day*. As the Legislature is imputed with the knowledge of appellate opinions, the fact the Legislature did not change the law in regard to the method of request actually solidifies the Court's ruling in *Allen v. Day*. In the matter of *Neff v. Cherokee Ins. Co*, 704 S.W.2d 1 (Tenn. 1986), the Tennessee Supreme Court held, "The Legislature is presumed to have knowledge of the state of the law on the subject under consideration at the time it enacts legislation." *Id.* at 4. A review of the 2008 revisions demonstrate that the changes do not affect the relevant holding in *Allen v. Day*, to wit: the method of the request is not material as long as the request is received and the request sufficiently identifies the records requested.

The two sections which were referenced in *Allen v. Day* were T.C.A. 10-7-503(a) and 10-7-505. With regard to section 503(a), though such was completely replaced by the Legislature in 2008, such did not affect the holding of *Allen v. Day*. The previous section required that the request be made "during normal business hours". The new section removed that requirement and simply required that the records be *available* during normal business hours. The new section reads, "All state, county and municipal records shall at all times, during business hours . . .be open for personal inspection by citizens of Tennessee . . .". Thus, if any implication is to be made it is that the Legislature responded to the Court's ruling in *Allen v. Day* by removing the requirement that request had to be made during normal business hours.

One of the fundamental principles of statutory construction is that the legislature is presumed to know the state of the law at the time of the passing of any law. An excellent example of this principle of statutory construction can be found in the matter of *State v. Powers*,

101 S.W.3d 383 (Tenn. 2002) in which the Tennessee Supreme Court addressed the marital communication privilege and construction of T.C.A. 24-1-201. As the Supreme Court explains in *Powers*, the marital communication privilege evolved over time and in *Adams v. State*, the Tennessee Supreme Court set forth the criteria for communication which were subject to the privilege. However, in a 1993 case, *State v. Hurley*, the Court found the privilege was only enforceable by the witness spouse. The next year, in response to *Hurley*, the Tennessee Legislature amended T.C.A. 24-1-201 to state that both spouses could assert the privilege. In *Powers*, the Defendant attempted to argue that the amendment abrogated the *Adams* case and, thus, a spouse, regardless of the communication, whether confidential or not, could not be allowed to testify against another spouse. The Tennessee Supreme Court rejected this argument stating,

> It is clear the amended statute expressly overturns the rule in *Hurley* that vested the privilege solely in the testifying spouse and provides that either spouse may assert the privilege. However, it is not clear the legislature intended to abolish the *Adams* factors. We conclude the legislature had no such intent. . . .The 1995 amendment showed no clear intent on the part of the legislature to alter [the *Adams* definition of confidential]. The statute does not define "confidential," "communications," or "privileged." Therefore, the meaning of those terms must be provided by the existing case law, including *Adams*. The legislature is presumed to know the state of existing case law. Thus, it would have been necessary for the General Assembly to explicitly abolish the *Adam* factors if that had been the intent. The 1995 statute, however, fails to mention the factors at all.

Id. at 393 & 394. Likewise, in the case *sub judice*, when the General Assembly specifically amended T.C.A. 10-7-503(a), given the state of the law pursuant to *Allen v. Day*, if the General Assembly intended to afford governmental entities the right to deny records request that were not made precisely according to the statute or its own policy, the General Assembly would have done so as it was presumed the General Assembly knew of the holding in *Allen v. Day* at the time of the 2008 Amendment. Clearly, the amendment does not even suggest such

authority. In fact, the inference is just the opposite. The 2008 Amendment specifically states that the entity must be open for public records inspections during normal business hours and the custodian of records must respond promptly and may take up to seven (7) days to respond if the records are not immediately available. There is not even a suggestion that the manner in which the citizen makes the request affects the duties of the governmental entity. Therefore, under the well-established principles of statutory construction the fact that the Tennessee General Assembly did not abrogate *Allen v. Day* in these changes, the intent of the General Assembly was that this Court's finding that a governmental entity cannot put form over substance when responding to a public records request is the proper construction of the TPRA.

C. THE DEFENDANT HAS FAILED TO CITE TO ANY AUTHORITY THAT CAN OVERCOME THE PLAIN LANGUAGE OF THE TPRA OR THE PRECEDENT SET BY *ALLEN V. DAY.*

The Defendant makes a valiant effort to side step the plain language of the TPRA, the well-established rules of statutory construction and this Court holding in *Allen v. Day* and afford itself the right to ignore records requests made by citizens by making the argument that a governmental entities are "largely responsible for adopting their own policies". In making such a bald assertion, the erroneously relies on the following: 1) the assertion the plain language of the TPRA does not compel the Defendant to accept an email as a records request; 2) a response to frequently asked questions on the Office of Open Records Counsel's website, which has no binding authority on this Court; 3) a 2003 unreported case, *Hickman v. Tennessee Board of Probation & Parole*, which actually supports the Plaintiff's position in this case; and 4) the argument *Allen v. Day* is not applicable to the case *sub judice*. As addressed below, the Plaintiff respectfully submits such assertions should be unavailing.

1. **The absence of an express requirement in the TPRA that a governmental entity must accept a records request via email does not equate to the authority to ignore a records request submitted by a citizen.**

Initially, the Court should be reminded that the Trial Court did not hold that the Defendant had to accept an email; the Court only held the current policy of only accepting a request in person and via U.S. Mail was in violation of the TPRA and precedent set by this Court. Nonetheless, the Defendant argues that it has the right to dictate the method of the request as the TPRA does not "expressly require custodians to accept emails to inspect public records". The Defendant reasons that because the TPRA does provide "other express restrictions", the absence of such restriction is to be construed as an intent of the General Assembly not to restrict a governmental entity in this regard. The Defendant relies upon the principle of statutory construction which states, "[t]he mention of one subject in a statute signifies the exclusion of other unmentioned subjects, and [o]missions are significant when statutes are express in categories but not others." *See* Def's Brief, p. 15-16. The proper application of this principle is provided above and a review of the very case upon which Defendant cites, *Harman v. Univ. of Tenn.*, 353 S.W.3d 734 (Tenn. 2001), demonstrates such does not apply in this matter as Defendant asserts.

Harman involved the demotion of a professor who sued pursuant to the Tennessee Public Protection Act (TPPA), commonly referred to as the Whistle Blower Act. In finding that the TPPA was not applicable in a demotion, as opposed to a termination, the Supreme Court held, "We note that the legislature did not include any terms indicating that other actions by the employer, such as "demotion", might also give rise to an action under the statute. The mention of one subject in a statute signifies the exclusion of other unmentioned subjects, and [o]missions are

significant when statutes are express in certain categories but not others. [citation omitted]. The legislature could have used terms in addition to "discharged" or "terminated" had it intended to target discriminatory activity beyond discharge or termination as it has done in other instances." *Id.* at. 738-739. In *Harman*, the plaintiff was asking the courts to create a whole new cause of action under the TPPA for a demotion or other retaliatory conduct and the Supreme Court rightly refused to do so as clearly had the Legislature wanted to add demotions as part of the prohibited activity, the Legislature would have chosen to do so. Such a situation is not analogous to the case at bar. Despite the Defendant's assertions, as this Court held in *Allen v. Day*, the TPRA is not silent on whether or not a governmental entity can reject a request it receives; the TPRA explicitly states that a governmental entity *cannot* refuse a request to inspect. "All state, county and municipal records shall, at all times during business hours . . .be open for personal inspection by any citizen of this state, and those in charge of the records *shall not refuse such right of inspection to any citizen*, unless otherwise provided by state law." T.C.A. § 10-7-503(a)(2)(A). (emphasis added). Had the Legislature intended to afford a governmental entity the right to refuse a request to inspect depending on the method of the request, similar to adding a demotion as part of a cause of action under the TPPA, the Legislature, instead of saying "unless otherwise provided by state law" would have stated "unless the citizen fails to make the request pursuant to the policies of the governmental entity" or other similar language. In essence, Defendant is attempting to use a specific rule of construction to overcome the primary rule of statutory construction: "Where the statutory language is not ambiguous, . . .the plain and ordinary meaning of the statute must be given effect." *Id.* at 738, *quoting Gleaves v. Checker Cab Transit Corp.*, 15 S.W.3d 799, 803 (Tenn. 2000). The term "shall not refuse such right by any citizen of this state, unless otherwise provided by law" is not ambiguous and the plain and ordinary

meaning of such words does not contemplate a governmental entity refusing a citizen the right to inspect based solely on the method of the request.

2. Neither the law nor the facts in this matter support the Defendant's argument the OORC's statements to Jim Fuqua are entitled to deference.

The Defendant's assertion that the Office of Open Records Counsel's statements to Jim Fuqua are entitled to deference should fail for several reasons. First, Elisha Hodge's statements to Jim Fuqua are not before the Court. During the course of Jim Fuqua's testimony, who was the attorney for the Defendant when the request by Plaintiff were made, Mr. Fuqua attempted to testify as to the advice he received from Elisha Hodge, the attorney for the Office of the Open Records Counsel (OORC) at the time, however, Plaintiff's counsel made a hearsay objection and the Court ruled that the statements could come in for the purpose of the effect such had on Mr. Fuqua's mind set, but not for the truth of the matter asserted. (TP Vol. XI, p. 231).Therefore, the statements were not submitted for the truth of the matter asserted, to wit: the legality of the Defendant refusing Plaintiff's email. Given such state of the record, even if the Court was to accept the assertion the OORC's opinion is entitled to deference such opinion is not before the Court for the Court to consider.

The Defendant attempts to enter the opinion of the OORC through the "Frequently Asked Questions", which are published on the OORC's website, however, the Defendant misstates the opinion of the OORC. The FAQ which Defendant references deals with request **<u>for copies</u>**, not request for inspection. *See* Def's Brief, p. 18. No. 25 of the Frequently Asked Questions states, "Is a governmental entity required to accept a public record request **<u>for copies</u>** via email or fax?" (emphasis added). Request for copies are in a different category and the Legislature has made

specific requirements for request for copies as opposed to request for inspections. Request for copies can be required to be in writing, they can be required to be on a form provided by the OORC and the governmental entity can charge for the copies and the labor to make such copies. *See* T.C.A. 10-7-503(a)(7)(A) & (C). No such requirements exist for request for inspection and the TPRA states that a request for inspection *cannot* be refused.

3. The Defendant has misstated this Court's ruling in *Hickman*.

Defendant asserts that in the matter of *Hickman v. Tennessee Board of Probation & Parole*, 2003 WL 724474 (Tenn. Ct. App., March 4, 2003) "this Court has expressly recognized that custodians can lawfully adopt policies substantively identical to the Board's public-records policy requiring citizens to submit inspection requests in person or by U.S. Mail." This is a misstatement of the Court's ruling as the issues were 1) whether or not the records requested were confidential, 2) the format in which the board had to respond and 3) whether or not the board had to do a manual search of its records. *Id.* at *8. At the trial court level, because the plaintiff was an inmate and had sent his request via U.S. Mail, an issue existed whether or not the board received plaintiff's request as the custodian of records denied ever receiving the request. However, this was not an issue at the appellate level as this Court found the board admitted to receiving the request during litigation and the board would have denied it anyway.

In *Hickman*, an inmate sought records from the Tennessee Board of Probation and Parole, however, the Board denied it ever received the request. (Ironically, though this is the primary case upon which Defendant has relied, the method of request was U.S. Mail, thus, Defendant has conceded, in part, that U.S. Mail is not always reliable). The Court ultimately determined that Hickman was entitled to records, however, the Defendant has insisted that the *dicta* in the case

confers authority on the Board to only provide two methods of requests. The language upon which Defendant relies, states, "In order to access public records, a citizen must either appear in person during normal business hours at the location where the public records are housed or, if unable to appear in person, the citizen may identify those documents *sought by mail* to the records custodian so that the records custodian can copy and produce those document without requiring an extensive search. The custodian may charge a fee for each document that is meant to cover both copying the item and delivering the copies." Id. at *3. (*relying* on *Waller v. Bryan*, 16 S.W.3d 770,774 (Tenn. Ct. App. 1999)(emphasis added). Initially, it should be noted, this statement of the law references the *delivery* of the records NOT the method of the request.

Further, the Defendant twists the words of the Court and the facts. The policy of the defendant board in *Hickman* at the time was, "If a person cannot, or chooses not to come to the place where the records are kept, the person may contact the Board and request copies of the records." *Id.* at *11. Nothing within the Board's policy required that such request must be by U.S. Mail; the Defendant in this case merely tries to confuse the issue as Hickman did make his request by mail. Therefore, to the extent that this Court's ruling is a tacit approval of the board's policy in *Hickman*, such does not translate into approval of the Defendant's policy in this matter as the two policy are not similar. As the real issue in *Hickman* was whether or not the records requested should be disclosed, it is difficult to imagine that this Court would have ruled any differently had Hickman sent his request by email as opposed to U.S. Mail. Indeed, the *Hickman* Court correctly states that there only two ways for a citizen to make a records request. Citizens can either make the request in person or if they do not want to appear in person, they do not have to do so, but can merely notify the government entity which records they want to inspect or be copied. *However, nothing in Hickman states that such request must be by U.S. Mail*